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MEMORANDUM OF LAW

DATE: March 7, 2000

TO: Charlene M. Gabriel, Program Manager, Facilities Financing
Planning and Development Review Department

FROM: City Attorney

SUBJECT: Waiver of Fees in Enterprise Zones

QUESTIONS PRESENTED

1. Are Housing Trust Fund fees legally waivable in the Metropolitan Enterprise Zone?
2. Are Development Impact Fees legally waivable in the Metropolitan Enterprise Zone?

SHORT ANSWERS

1. Housing Trust Fund fees may be waived if their purpose is already being accomplished and they would thus be duplicative. The purpose of Housing Trust Fund fees is to improve the communities of the low income population within the Metropolitan Enterprise Zone [MEZ]. Commercial development within the MEZ benefits the surrounding low income population. It would be unnecessary and unduly burdensome to also charge commercial developers a Housing Trust Fund fee. Waiver of the fees will not create a burden upon the community within the MEZ. Thus, the Housing Trust Fund fees are legally waivable.

2. Waiver of Development Impact Fees is not legally permissible for three reasons. First, the City Manager lacks authority to waive the Development Impact Fees. Second, the California Enterprise Zone Act does not authorize the waiver of Development Impact Fees as an incentive to encourage development within such zones. Finally, the waiver may be

unconstitutional, even if it were authorized by the resolution and the statute. Fees must be roughly proportional to the impact caused by the individual development. Development Impact Fees are assessed from an area whose boundaries are larger than, and not coterminous with, the MEZ. Waiver of Development Impact Fees within the MEZ forces the entire burden of payment upon those within the Development Impact Fee boundaries, but outside the MEZ. The lost revenue resulting from the waivers would be apportioned among such developers. Thus, their fees would be greater than the amount of impact caused by their individual projects and would not be roughly proportional. Therefore, Development Impact Fee waivers within the MEZ are not legal.

ANALYSIS

I. Housing Trust Fund Fees

The imposition or exemption of fees associated with development will be upheld when they are within the domain of traditional land use regulations, if they bear a rational relationship to the purpose of the fee or exemption. *Ehrlich v. City of Culver City*, 12 Cal. 4th 854 (1996). “If a condition is imposed pursuant to an ordinance or rule of general applicability — that is, as a result of a legislative determination — the condition is constitutionally permissible unless . . . [it] does not substantially advance a legitimate governmental purpose” *Id.* at 906.

For example, where a city required that a developer either pay a fee equal to 1 percent of the total value of the development or provide a work of art of equivalent value the requirement was upheld. It was categorized as an aesthetic condition, similar to traditional land use regulations imposing minimal building setbacks, parking and lighting conditions, and landscaping requirements. Because it was a traditional land use regulation it was only subject to rational basis review, and was not subject to the heightened scrutiny of the rough proportionality test. *Id.* at 886.

Here, the City Council adopted an ordinance in order to alleviate the low income housing shortage. The ordinance was adopted pursuant to recommendations by the Housing Trust Fund Task Force. San Diego Ordinance O-17454 (April 16, 1990). The ordinance contains an exemption for non-residential development within the MEZ. *Id.* “It is recognized that it is inappropriate to impose a fee requirement on certain types of uses because . . . special characteristics of the use otherwise address the needs of the same low income population to which this ordinance is addressed, and such contributions would be adversely affected by the fee” *Id.*

The broad purpose of creating an MEZ is to assist the low income population in which it is located. Cal. Gov’t Code § 7071. One of the problems associated with commercial development is that it increases housing prices. Those with less income are then less able to find affordable housing. The legitimate state interest advanced by imposition of the Housing Trust Fund fees is to subsidize more affordable housing for those most burdened by the increased

housing costs associated with commercial development. San Diego Ordinance O-17454 (April 16, 1990).

However, the City Council has legislatively determined that commercial developments within the MEZ “address the needs of the same low income population” that the Housing Trust Fund fees are intended to help. *Id.* In addition, the City Council has further determined that to require these developments to pay the fee would be counterproductive to implementing the City’s overall policy of advancing the needs of low income households. *Id.* As discussed above, because the Housing Trust Fund fee itself is imposed as a “rule of general applicability” and “as a result of a legislative determination,” the fee will be considered constitutionally suspect only if it does not “advance a legitimate governmental purpose.” *Ehrlich*, 12 Cal. 4th at 906. Therefore, it stands to reason that if the Housing Trust Fund fee is subject to this low threshold of constitutional scrutiny, the same legal standard of scrutiny should be applied to the legislatively created exemption for developments within the MEZ.

The commercial development within the Enterprise Zone accrues benefits to the surrounding low income community through encouraging investment, stimulating growth, and increasing job opportunities. Cal. Gov’t Code § 7071. The City Council has legislatively determined that imposition of Housing Trust Fund fees in the MEZ will impair this goal, a policy objective which overlaps with the goal of the Housing Trust Fund program to assist low income households. Thus, waiver of Housing Trust Fund fees for commercial development within the MEZ is legal because it substantially advances the legitimate governmental interest of benefitting the low income population within the zone.

II. Development Impact Fees

Executive actions by the City Manager are authorized by the City Council. The City Council passed a resolution in 1985 stating “the City Manager is hereby authorized to direct that the development plan *processing fees* normally collected by the City’s Engineering and Development Department, Planning Department and Building Inspection Department be waived for commercial and industrial businesses within [the MEZ] if approved by the State of California.” San Diego Resolution R-262864 (April 8, 1985) (emphasis added).

While the Council resolution does authorize the Manager to waive “processing fees,” the resolution does not appear to address waiver of Development Impact Fees [DIFs]. DIFs are not processing fees and the resolution cannot be construed broadly to waive all fees within the MEZ. “Express exemptions [or waivers] are to be strictly and narrowly construed and will not be extended beyond the import of their terms.” 58 Cal. Jur. 3d, *Statutes*, § 116 (1999); *City of Chicago v. Illinois Dep’t of Revenue*, 590 N.E.2d 478, 481 (Ill. 1992) (statutes granting exemptions from fees are construed strictly).

It cannot be assumed that the City Council intended to exempt DIFs, when it specifically listed only processing fees in San Diego Resolution R-262864 (April 8, 1985). Thus, the City

Manager is not legally authorized to waive DIFs within the MEZ. Even if the resolution had specifically authorized the City Manager to waive DIFs in the MEZ, the validity of such an authorization is still dependent upon compliance with state law. The relevant state law is the California Enterprise Zone Act. Cal. Gov't Code §§ 7070-7089. The act specifically allows a city or county to establish regulatory incentives which "eliminat[e] or reduc[e] fees for applications, permits, and local government services." Cal. Gov't Code § 7073(b)(2)(B). The waiver of DIFs is not listed as a permissible incentive.

Although the regulatory incentives referenced in the state code are not limited to those listed, authorization for DIF waivers cannot legally be inferred because the result is constitutionally suspect. The statutory provision under scrutiny must be given a reasonable interpretation which, upon application, will result in wise policy. *United Business Com. v. City of San Diego*, 91 Cal. App. 3d 156, 170 (1979). "The court should take into account matters such as context, . . . legislation upon the same subject, public policy, and contemporaneous construction." *Cossack v. City of Los Angeles*, 11 Cal. 3d 726, 733 (1974). Where a statute is vague it cannot be construed to produce an unconstitutional result.

The City must have rough proportionality between the DIFs charged in an area and the projected impact of the proposed development. *Dolan v. City of Tigard*, 512 U.S. 374 (1994). "No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication [or fee] is related both in nature and extent to the proposed development impact." *Id.* The requirement of rough proportionality for all fees imposed pursuant to development was codified in the Mitigation Fee Act. Cal. Gov't Code § 660011(b).

For example, in the *Ehrlich* case, Culver City tried to impose a monetary exaction of \$280,000 on a property owner's application for rezoning of his recreational-use property to permit its development as a commercial office building. The fee was based upon an estimate of how much it might cost the city to build other recreational facilities elsewhere. But the city failed to demonstrate, by required individualized findings, that the \$280,000 recreational fee imposed was "roughly proportional" to the public impact of the land use change. Thus, the fee was not roughly proportional and was struck down. *Ehrlich*, 12 Cal. 4th at 881.

Similarly, waiver of the DIFs here would cause their burden to fall disproportionately upon those developments outside the MEZ, but within the area in which DIFs are otherwise imposed. The cost of the additional infrastructure necessitated by the developments remains the same. If the revenue lost from the waivers is not paid, the result is insufficient funding. If the lost revenue is apportioned among those outside the MEZ, the exaction is not roughly proportional to the individual development's impact. Instead, the developers would pay a fee proportional to the impact of their development *plus* a percentage of the fees associated with the impact of the developments within the MEZ. This is unconstitutional. Such a result cannot be inferred to have been authorized by the Enterprise Zone Act.

CONCLUSION

Housing Trust Fund fees in the MEZ are legally waivable. The waiver satisfies the rational basis test by substantially advancing a legitimate governmental interest. The interest is to benefit the community within the Metropolitan Enterprise Zone.

Development Impact Fees in the Metropolitan Enterprise Zone are not legally waivable. They are not specifically authorized by either the City Council resolution or the California Enterprise Zone Act. Such authorization cannot be inferred because the result would be unconstitutional. Waiver necessitates the imposition of fees upon those outside the Metropolitan Enterprise Zone. Because such fees would not be roughly proportional to the individual development's impacts, they would be unconstitutional.

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March 7, 2000

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